TOPICAL INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Reasons for Granting Petition for Certiorari	5
(a) Violation of petitioners' privilege against self-incrimination	5
(b) Violation of petitioners' Sixth Amendment right to a "speedy trial"	6
Conclusion	8

TABLE OF AUTHORITIES CITED

Cases

Griffin v. California, 380 U.S. 675	5
Klopher v. State of North Carolina, 386 U.S. 213	6, 7
United States v. Ewell, 383 U.S. 116	6

Statutes (United States)

United States Constitution	
Fifth Amendment	2, 3, 5, 6
Sixth Amendment	2, 3, 6, 7

TABLE OF AUTHORITIES CITED

United States Statutes (cont'd)	Page
28 U.S.C. 1257(3)	2

Statutes (California)

Penal Code	
Section 182	4
Section 995	4
Section 998	3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. .....

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent,

vs.

SAMUEL A. LONGO, ROBERT MIGLIACCIO,

Petitioners.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioners were convicted in the Superior Court of the State of California for the County of Orange, and judgment was pronounced and entered thereon April 11, 1968. On appeal, the Court of Appeal of the State of California, Fourth

District, Second Division, affirmed the decision of the trial court, in an unpublished opinion (4th Crim. No. 3392), a copy of said opinion being attached hereto as Appendix "A." Hearing before the California Supreme Court was denied on February 13, 1970 (Appendix "B").

JURISDICTION

This petition for certiorari is timely filed within 90 days of the date of denial of hearing by the California Supreme Court.

The jurisdiction of the United States Supreme Court is invoked under Title 28, United States Code, section 1257(3).

QUESTIONS PRESENTED

1. Whether the trial court's use of CALJIC 51 (instruction to the jury to draw no inference of guilt from the accused's failure to testify), over defendants' objection, is itself in such circumstances an unconstitutional "comment" on defendants' Fifth Amendment privilege.

2. Whether, in the absence of any reason on the part of the prosecution therefor, a delay of thirteen months between an order dismissing the indictment with directions to resubmit it to the grand jury and such resubmittance is not a violation of the defendants' right to a "speedy trial" under the Sixth Amendment, unless the defendants have shown an impaired ability to defend themselves owing to "evidence disappearing" or "witnesses being lost."

STATUTES INVOLVED

Fifth Amendment to the United States Constitution:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law. . . . "

Sixth Amendment to the United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . . "

California Penal Code section 998:

"If the court directs the case to be resubmitted . . . and unless a new indictment is found . . . before the next grand jury of the county is discharged, the court must, on the discharge of such grand jury, make . . . [an order discharging the defendant]."

California Jury Instruction - CALJIC 51, the instruction in question, read as follows (now **CALJIC 2.60**):

"DEFENDANT NOT TESTIFYING - NO INFERENCE OF GUILT MAY BE DRAWN.

"It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus the decision as to whether he should testify is left to the defendant, acting with the advice and assistance of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed

by you or enter into your deliberations in any way."

STATEMENT OF THE CASE

This case originally commenced by grand jury indictment on July 15, 1965, filed in the Superior Court of Orange County, accusing the defendants of a violation of Penal Code section 182 (conspiracy). As a result of the indictment, bail was set at $10,000, plus penalty provisions, and said bail was posted by each of the defendants on or about July 16, 1965. On November 29, 1965, on motion by all defendants, under section 995 of the Penal Code, the indictment was dismissed, with the court ordering the District Attorney to resubmit the matter to the grand jury. It was not until December of the following year that the District Attorney resubmitted the matter to the grand jury, and an indictment was handed down two days later, on December 16, 1966. When the District Attorney did submit the matter, the defendant Longo was being tried on a similar offense in Los Angeles County and was awaiting trial in Los Angeles on another conspiracy charge which went to trial in February of 1967 and ended in October of that year. In view of the amount of time between dismissal of the original indictment with an order to resubmit and such resubmittance, petitioners moved the court, prior to trial, for dismissal. The motion was denied. Petitioners urged the same motion to the trial department at a pre-trial hearing. During the argument for dismissal, the court offered the District Attorney an opportunity to explain the necessity for delay. The District Attorney offered no adequate explanation for the 13-month delay (Reporter's Transcript p. 32). The motion to dismiss was denied by the court with the following comment:

"If you have been prejudiced, then the higher courts can take care of it. I think you have a point that you certainly should raise and some court is going to have to pass on it. I have passed on it here. I have denied your motion but I think it is a matter of grave concern to me as to just what the higher courts might do with it, and I think we ought to go to trial here and get this case tried." (Reporter's Transcript p. 35.)

REASONS FOR GRANTING PETITION FOR CERTIORARI

(a) Violation of petitioners' privilege against self-incrimination.

Since this Court in *Griffin v. California*, 380 U.S. 675 (1965), has opined that a defendant's Fifth Amendment privilege against self-incrimination must necessarily encompass a prohibition against any "comment" by the prosecution regarding the exercise of that privilege, it is destructive of that end to permit courts to caution the jury that a defendant has a constitutional right not to testify and that such should not create any inference of guilt, when defense counsel is vigorously objecting to such an instruction, arguing that the defendant's rights under the circumstances would be better protected by not making any mention of it at all, that an affirmative admonition to that effect can only serve to raise the matter as an issue in the minds of the jurors. It would seem that the accused, with the advice of competent counsel–and not the prosecutor–is in the best position to assess the actual merits

and drawbacks of an instruction such as CALJIC 51 in protecting Fifth Amendment rights.

(b) Violation of petitioners' Sixth Amendment right to a "speedy trial."

The 13-month delay by the District Attorney in resubmitting the matter to the grand jury presents a substantial and recurring question of the logical general boundaries of this Court's theoretical structure set out in *United States v. Ewell*, 383 U.S. 116, and *Klopher v. State of North Carolina*, 386 U.S. 213. In *Ewell* this Court announced the underlying purpose of the Sixth Amendment's guarantee of a speedy trial, declaring:

> "This guarantee is an important safeguard (1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibilities that long delay will impair the ability of the accused to defend himself." (*United States v. Ewell, supra*, at 120.)

And in *Klopher*, citing *Ewell's* second safeguard, where an indictment (as in the instant case) is pending for an indefinite period of time under an order of *nolle prosequi*, it is a denial of the indictable defendant's right to a "speedy trial"–the Court reasoning:

> "The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging

> this oppression, as well as the 'anxiety and concern accompanying public accusation,' the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States." (*Klopher v. State of North Carolina, supra,* at 221, 222.)

If the constitutional requirement that a defendant shall enjoy a speedy trial is to have "teeth," then it would seem that prosecutors cannot be permitted the use of such dilatory tactics as are evidenced in the present case, absent reasons therefor, knowing only that an indefinite delay is a violation of the Sixth Amendment's guarantee of a speedy trial and anything short thereof being subject to:

> "We could discover no authority holding a delay similar to that here presented to be excessive." (Opinion of the Court of Appeal of the State of California, Fourth District, Second Division, Appendix "A" p. 13.)

In addition, the Court of Appeal's dismissal of petitioners' claim of denial of Sixth Amendment right to a speedy trial was based on the erroneous theory that:

> "The rule requiring a defendant be promptly brought to trial is to insure against witnesses being lost and evidence disappearing. (*United States v. Ewell, supra,* 383 U.S. 116 [86 S.Ct. 773].) Defendants make no showing of this kind of prejudice. We find defendants' argument without merit." (Appendix "A" p. 14.)

By the opinion of the Court of Appeal, only a showing involving lost witnesses and evidence disappearing would permit a dismissal for prejudice. There is no rule that states that prejudice cannot occur other than as indicated in the opinion of the Court of Appeal. The Court of Appeal erred by failing to take into account the other equally prejudicial evils, enunciated in *Ewell,* discussed in *Klopher* and manifested in the instant case, which the constitutional right to a speedy trial properly seeks to eradicate.

CONCLUSION

Several errors of constitutional magnitude were committed in the present case. Defense counsel is charged with the duty of protecting his client's rights, and a jury instruction calculated to protect those rights, when offered at the instance of the prosecutor and sustained over vigorous objection of defense counsel, is not proper. For these reasons and those stated directly above, the requested writ of certiorari should be granted.

Respectfully submitted,

MARKS, SHERMAN &
LONDON

ARTHUR SHERMAN
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Attorneys for Petitioners

APPENDIX "A"

Opinion of the Court of Appeal of the State of California, Fourth Appellate District, Second Division (Certified for nonpublication).

APPENDIX "B"

(Post Card Notification)
Hearing Denied - Supreme Court of the State of California.

APPENDIX "A"

OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, SECOND DIVISION (Certified for Nonpublication)

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. SAMUEL A. LONGO, et al., Defendants and Appellants.

FILED December 18, 1969.

4 CRIM. 3392

APPEAL from a judgment of the Superior Court of Orange County. Karl Lynn Davis, Judge. Affirmed in part and reversed in part.

Marks, Sherman & London and Arthur Sherman for Defendants and Appellants.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and Thomas E. Warriner, Deputy Attorney General, for Plaintiff and Respondent.

By indictment, December 16, 1966, defendant Samuel Longo was charged in count I with conspiracy to commit grand theft (violation of Penal Code, section 182); in count II with conspiracy to commit grand theft and violate Penal Code, section 476(a) (violation of Penal Code, section 182); and in counts III, IV and V with grand theft (violation of Penal Code, sections 484-487). Defendant Robert Migliaccio[1] was charged as a codefendant in count I.

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1 Also known as Robert Mig.

After a jury trial, both defendants were found guilty of all counts charged. Probation was denied as to defendant Longo and he was sentenced to state prison for the term prescribed by law, his sentence on counts I and II to run consecutively and his sentence on counts III, IV and V to run concurrently with that for counts I and II. Probation was granted to defendant Migliaccio on condition, among others, that he serve one year in the Orange County jail. Defendants filed a timely notice of appeal from this judgment pronounced and entered on April 11, 1968.

Benone and Victor Terrano were accused in the indictment as codefendants as to counts I through IV and were jointly tried with the defendants previously named. It was alleged that they were coconspirators as to counts I and II. The jury was unable to agree on a verdict as to defendants Benone and Victor Terrano and the court declared a mistrial as to them. The People subsequently moved to dismiss all counts against Victor Terrano "in the furtherance of justice" and the motion was granted. Benone Terrano entered a plea of guilty to count I of the indictment and all other counts were dismissed,again "in the furtherance of justice."[2]

Defendants' conviction was the result of a second indictment. The prosecution sought a previous indictment to the one returned on December 16, 1966, alleging the same misconduct involved in the instant case. The original indictment was filed July 15, 1965. The court dismissed the original indictment on November 29, 1965, pursuant to Penal Code, section 995, but ordered the district attorney to resubmit the matter to the grand jury. The matter was then resubmitted

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2 A jury was impaneled for the retrial of the Terranos. This disposition came, in chambers, before taking evidence.

to the next grand jury almost 13 months later and after two days of testimony the present indictment was returned.

Rockview Milk Farms, Inc. (Rockview) was owned and operated by J. J. McCandless. Rockview was having financial difficulties. In an attempt to solve Rockview's financial problems, Mr. McCandless was put in contact with a group known as Associated Investors, Ltd. (Associated). After an initial meeting with Associated, a second meeting was held at the Associated office around November 20. Present were defendants, Longo, Ben Terrano, McCandless and his attorney, a Mr. Irving Rosen. At this meeting, McCandless was advised by both Terrano and Longo that if he would sign a voting trust agreement, their company would place over one million dollars into the dairy. At this time, a financial statement of Associated was brought forward indicating a net worth of over $3,000,000, mostly in real property. There was testimony that the real property shown on the financial statement did not belong to Associated but was temporarily in their names for purposes of obtaining financing for a Mr. Lee Sievers.

Longo and Terrano further represented they would help manage Rockview, and would in this connection receive $20,000 a year compensation with McCandless still president and his own draw increased to $28,000 a year. After additional conversations and a third meeting, the voting trust agreement was signed, together with other documents such as an assignment of accounts receivable, a corporate note for $399,000, several deeds of trust, and chattel mortgages. It was represented that the documents would be security to Associated and would assist in obtaining bank loans for the money needed by Rockview.

Associated took over active management on December 8, 1964, with Longo requesting Mr. McCandless to stay away from the business for 30 days. Longo brought in as general manager defendant, Robert Migliaccio. The new management commenced other changes including the opening of a new bank account at Crocker Citizens Bank, the termination of various personnel, the discontinuance of the Brinks Service, a new system for the handling of deposit of funds, inventory control and use of a Univac system for data processing. After December 8, 1964, the date defendant Migliaccio took over McCandless' office, Mr. McCandless repeatedly asked defendant Longo to permit him to examine the books. His requests were denied. In January 1965, he was shown a report that was made by a Mr. Brown, an accountant hired by Associated. The report showed Rockview to be making a profit.

The period during which Associated was in control of Rockview included the months of December 1964 and January and February 1965. On the 25th of February, 1965, Rockview, through Mr. McCandless, filed under Chapter XI of the Bankruptcy Act. Mr. McCandless then moved back into his office at Rockview where he remained one or two days until the receiver took over.

This concludes a brief summary of the steps by which Associated acquired and lost control of Rockview. These acts of acquiring control are alleged to be overt acts in furtherance of the conspiracy charged in count I of the indictment.

The actual theft alleged to be the object of the conspiracy in count I consisted of checks written by Robert Migliaccio and Victor Terrano on Rockview checking account to the creditors of another corporation, Taco Pronto.

Defendants, as Associated Investors, became acquainted

in January 1965 with Donald Hettick who was the president of several corporations that owned and ran a chain of restaurants called Taco Pronto. Taco Pronto was in financial difficulty. Longo indicated to Hettick that Rockview was a large company, did considerable purchasing and could help Taco Pronto by volume purchasing with Associated furnishing management service and bookkeeping assistance. In their first meeting concerning the venture, Ben Terrano, Samuel Longo, possibly Victor Terrano, and George Buckles, the personal attorney of Mr. Hettick, were present. Robert Migliaccio was present at a subsequent meeting. It was represented that Associated owned a bank called the Orange Empire National Bank. The parties discussed a voting trust agreement and financing of about $120,000. About three meetings later with various persons at different meetings, an agreement was entered into on January 30, 1965. It provided that Associated would put $50,000 into the company. Associated was to provide management services and be paid $15,000 per year. The agreement was signed by Ben Terrano on behalf of Associated as trustee under the voting trust.

Pursuant to the above agreement, a list of Taco Pronto creditors was delivered to Associated. Checks drawn on Rockview accounts and signed by Victor Terrano, were issued to the following Taco Pronto creditors: Harvey Miller for $350 (February 1, 1965); Meadowgold Dairies for $955.60 (February 1, 1965); Philip L. Gabriel for $600 (February 4, 1965); Ted McGoey for $520 (February 1, 1965); and Inland Empire Meat Company for $5,000 (February 4, 1965). A check signed by Robert Migliaccio, drawn on Rockview, was issued to another Taco Printo creditor, Southern Counties Gas. It was for $64.97 and dated February 11, 1965. Only the check to

Mr. McGoey and the check to Mr. Gabriel cleared; the other checks drawn on Rockview accounts were returned to the maker. These two checks which allegedly involved an actual theft were the basis of counts III and IV of the indictment. Count III alleges a theft in excess of $200 from Rockview on February 1, 1965, and count IV alleges the same on February 4, 1965.

No attempt was made to conceal the checks written to Taco Pronto creditors. The Rockview controller testified that he was given a list of the checks written on Rockview accounts to Taco Pronto creditors by Mr. Longo and that he did not indicate to him that he should not show this on the books. However, the then president of Rockview, Mr. McCandless, testified that he did not authorize or have knowledge of any of the foregoing disbursements.

In the second count of conspiracy it is alleged that Longo and the Terranos conspired to feloniously take money of the Orange Empire National Bank in excess of $200 and that they conspired to violate Penal Code, section 476(a), with intent to defraud three different banks in addition to Rockview. The basis of the second count is that certain practices by defendants called "check kiting" resulted in an overdraft position for the Rockview Orange Empire Bank account in the amount of approximately $650,000.

It is undisputed that after Associated took control of Rockview, they caused the Rockview account at Community Bank of Huntington Park to be closed and opened Rockview checking accounts at Orange Empire National Bank, Crocker Citizens Bank and the Bank of Santa Ana. During Associated's period of control, checking accounts in the name of Associated Investors were also opened at these same banks.

James R. Kelley, of the Bank of California, and James F. Hynes, an accountant with T. M. Mulhern & Associates, employed as special agent to investigate this matter, were called upon as experts by the district attorney to testify concerning the banking activity of the companies. In the opinion of these witnesses, a check kite or float was in operation between the accounts of Associated and Rockview at Crocker Citizens Bank and Orange Empire National Bank. The witnesses indicated that a check kite or float is where accounts would be opened at several different banks and checks deposited in one account drawn from the other account. At the time the check is drawn there are insufficient funds in the account of the bank on which it is drawn. Then prior to the clearance of the check deposited, additional deposits would be made in the second bank drawn against the first bank, thereby creating a float. There is created by this rotation a fictitious balance existing in two separate accounts which if manipulated properly, may be maintained at such a high level that other lesser amounts of checks may be paid from both accounts utilizing the fictitious balance which has been created between the two accounts. By taking advantage of the clearance time after deposit of a check in one account to clear the account the check is drawn upon, and the continuing rotation of checks from one account to the other, or several different accounts, fictitional balances are caused.

The investigation by the witness, Hynes, revealed deposits to all the accounts of some $24,000,000, with approximately $1,250,000 being good money and the rest being checks shifted from one company account to another. The check transfers made it appear on the ledger sheets that there were small overdraft balances in the Orange Empire accounts of the

companies, when in reality the overdraft was substantial. Moreover, the check transfers made it appear at the Crocker Citizens Bank that there were substantial balances in the accounts when, in fact, the balances were minimal. The witness further examined the books and records of Rockview and none of the checks involved in the check kite were found in the check register of the company.

Both Crocker Citizens Bank and the Bank of Santa Ana became suspicious of the banking practices of Associated and would not honor any checks drawn on the Associated or Rockview accounts until checks deposited in these accounts had cleared. As a result of this and a so-called "hand exchange" between Crocker Citizens Bank and Orange Empire Bank, there existed no overdraft position at Crocker Citizens or the Bank of Santa Ana at the end of Associated's period of control over Rockview.

Orange Empire Bank did not follow the procedures of the other two. About January 15, 1965, Mr. Forrest Marsh, a bank operations officer, and John Wright, vice president of the bank, brought the overdrawn position of the Associated and Rockview accounts to the attention of the bank president, John Nelson. Mr. Nelson decided to continue the accounts and honor checks drawn on them despite the fact that the checks deposited in these accounts were uncollected. Mr. Wright testified that this, in effect, amounted to the bank loaning money to Associated and that he related this to Mr. Nelson. Mr. Wright stated that the continued honoring of Associated and Rockview checks under the circumstances was not normal, orthodox banking procedure. There was no agreement between the bank and Associated or Rockview with regard to honoring overdrawn checks. Mr. Kelley, an auditor

for the Bank of California, also testified that the bank officers of Orange Empire Bank followed improper banking practices in continuing the accounts. The resulting overdraft at Orange Empire Bank as of June 1965 was approximately $650,000. Mr. Marsh testified that had the accounts been closed on January 15, 1965, as he stated he recommended to Mr. Nelson, that it was his opinion that there would have been no outstanding moneys due to the Orange Empire Bank.

There was also evidence presented at trial about Rockview's "loose" accounting and bookkeeping procedures upon Associated's taking control. William Brown testified he was employed as controller of Rockview during December of 1964 and January and February 1965. He testified that Rockview's cash receipts, after being turned in by the drivers, were collected, a deposit was made up, and the money was transported to the office of Associated. During Mr. Brown's tenure as controller, he repeatedly urged that the money be deposited intact at the bank. He further urged that the bank accounts be reconciled and audited by a certified public accounting firm. To Mr. Brown's knowledge, Rockview's accounts were never completely audited, nor were the checking accounts reconciled.

Shirley Lawless, a cashier at Rockview from March of 1964 to September of 1965, testified that after Associated took over the operation of Rockview, the daily receipts were tabulated and then were placed in a briefcase to be turned over to the defendant Migliaccio. Occasionally, the money would be picked up one or more times during the day. On these occasions, a "pick up man" would come in and tell Mrs. Lawless that he was to be given all the money from the

cash drawer. On some of these occasions Mrs. Lawless was not permitted time to record the exact amount of money given to the "pick up man." After Associated took over, the petty cash fund was increased from $25 to $100. The money was no longer disbursed by account numbers, but rather defendant Migliaccio would call Mrs. Lawless and inform her that she was to have a certain amount of money ready, and then a person would pick up the money. On some occasions, defendant Migliaccio would pick up the funds himself. After the sheriff had been installed as a receiver, instructions were given Mrs. Lawless to give only part of the money to the sheriff, and the remainder was to be given defendant Migliaccio, or to a Mr. Percanti. Mrs. Lawless refused to give any money to anyone other than the sheriff. However, her assistant, Sandra Amey, did give money to defendant Migliaccio.

The referee in bankruptcy appointed an accountant to investigate and report on the financial condition of Rockview. After over 100 days of work on the project, he concluded that during the period of Associated's control the receipts of Rockview totaled $1,384,155.37 and the bank deposits amounted to $1,225,553.82 for a net difference of $158,601.55. He later testified the legitimate expenses of Rockview to be $1,321,741.13 and seemed somewhat confused about whether $73,000 might have been deposited in the Paramount Branch of Bank of America. He also indicated that his computations were based on estimated rather than actual expenses.

Count V of the indictment charged Longo with grand theft from J. J. McCandless on February 15, 1965. Mr. McCandless testified that in December of 1964, he took over J. P. Dairies and operated it for awhile, then gave it back to

a Mr. Polhemus who sold it to Mr. Longo. Mr. McCandless testified that the J. P. Dairies sold milk to Rockview in December, full payment being made for it on February 15, 1965. He testified no money was due him for the sale of milk in January. Apparently, the sale of the dairy to Longo was made in January.

Mrs. Helen Griffith had the duty of paying farmers for the milk sent to Rockview. She testified that in January of 1965, she drew a check to Mr. McCandless, as a producer of milk, in the amount of $2,374.79. Mrs. Griffith took the check to defendant Longo for his signature. Defendant Longo told Mrs. Griffith to destroy the check and to make a check out to him. Mrs. Griffith replied, "there is no contract under your name. We cannot make a check out to a producer where there is not a contract in the State's name." To this Mr. Longo replied that "since he fed them (the cows) he should get the money for them." Defendant Longo then had his secretary draw the check to him. The draft drawn to Longo was never signed or used by him, and the original unsigned, unused check was produced in court as one of defendant's exhibits. McCandless himself disclaimed any personal contract with Rockview and said that any contract was through J. P. Dairies, and further claims to have never received any personal funds from the dairy for milk sales. It is unclear whether Mr. McCandless claims any money is due him for any milk.

SPEEDY TRIAL

Defendants first argue that they were improperly denied their right to a speedy trial. They contend that the district attorney's delay of 13 months in resubmitting the instant matter to the grand jury after granting of the motion under

Penal Code, section 995, caused substantial prejudice to defendants. The prejudice alleged consisted of defendants' being on bail during the whole period and defendant Longo being unable to take the stand to defend himself because in the interim he was convicted of another but similar offense in Los Angeles County and it being his opinion that his impeachment on this other offense would substantially prejudice his defense in the instant case. Thus, he chose not to testify on his own behalf.

By implication, Penal Code, section 998,[3] sanctions resubmission of an indictment to the *next* grand jury, after an indictment is dismissed under Penal Code, section 995, where the court directs resubmission. Defendants were so reindicted in December 1966 by the "next grand jury."

Moreover, had defendants been discharged and bail exonerated on November 29, 1965, such order would not have been a bar to further prosecution for the same offense. (Penal Code, section 999.) The second indictment was well within the three year period of limitation.

The principal case relied upon by defendants is *Klopfer v. State of North Carolina*, 386 U.S. 213 [87 S.Ct. 988]. In *Klopfer*, the court held the North Carolina procedure of *nolle prosequi* violative of a defendant's right to a speedy trial guaranteed him by the Sixth Amendment. *Nolle prosequi* is a procedure whereby a defendant is allowed to go free but may be prosecuted at any time the authorities desire. In *Klopfer*, the court declared a mistrial in defendant's case

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3 This section, in part, provides "If the court directs the case to be resubmitted . . . and, unless a new indictment is found . . . before the next grand jury of the county is discharged, the court must, on the discharge of such grand jury, make . . . [an order discharging the defendant]."

and a *nolle prosequi* was obtained by the solicitor. The effect of the *nolle prosequi* was to cause the defendant to be forever subject to prosecution.

We consider *Klopfer* clearly distinguishable from the instant case. The court in *Klopfer* was obviously concerned about the lack of any cutoff date to the defendant being subject to prosecution. (See *People v. Doctor*, 257 Cal.App.2d 105, 109-110.) In California, Penal Code, section 998, explicitly limits the time defendant can be subject to prosecution and that limit was not exceeded in the present case.

In *United States v. Ewell*, 383 U.S. 116, 120 [86 S.Ct. 773, 776, 15 L.Ed. 627], the Supreme Court held 19 months between arrest and hearings on indictment not to be excessive and reversed a lower court's dismissal of the case. (See *United States v. Jackson*, 369 F.2d 936, 939.) The court in *Ewell* said: "[t]he ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." (*Id.*; *Hodges v. United States*, 408 F.2d 543, 549.) In *Ewell*, the court also noted the lack of any showing of prejudice by defendants. "They mention no specific evidence which has actually disappeared or has been lost, no witnesses who are known to have disappeared." (383 U.S. at 122 [86 S.Ct. at 777]).

We could discover no authority holding a delay similar to that here presented to be excessive. This was a very complex case and a delay of 13 months was not unreasonable. Moreover, defendants' showing of prejudice is unpersuasive. Defendant Longo's argument that his subsequent conviction precluded him from taking the stand would be better directed

against the rule of allowing impeachment by priors and not his lack of a speedy trial.

The rule requiring a defendant be promptly brought to trial is to insure against witnesses being lost and evidence disappearing. (*United States v. Ewell, supra,* 383 U.S. 116 [86 S.Ct. 773].) Defendants make no showing of this kind of prejudice. We find defendants' argument without merit.

CALJIC 51

Defendants complain that over their objection the court instructed the jurors that they must not draw any inference of guilt from the defendants' failure to testify and that such a fact should not be discussed nor enter into their deliberations in any way. (CALJIC No. 51, 1965 Rev.)

This court has heretofore considered this problem and has held that this instruction is proper, whether given *sua sponte* or at the request of the prosecution or the defendant, with or without objection. (*People v. Brady,* 275 A.C.A. 1113, 1121 [hearing denied].)

GRIFFIN ISSUE

Defendants' next argument is that it was error for the prosecutor to argue to the jury concerning the absence of evidence of defendant Longo's managerial qualifications. The prosecutor argued as follows:

"Then we get to the management part, which was a part of their promise to Rockview Milk Farms. They were going to put in this modern management. Well who do we have? We have Mr. Sam Longo. We don't know at this point what his management qualifications are. There has been no evidence that he has been any kind of a manager or qualified to manage either."

If a prosecutor comments on the failure of a defendant

to testify, it is violative of defendant's rights under the Fifth Amendment. (*Griffin v. California*, 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106].) Moreover, some very indirect statements of a prosecutor have been found to be violative of *Griffin*. (*People v. Modesto*, 66 Cal.2d 695, fn. 11 on p. 710.) The rule in *Griffin*, however, "does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses." (*People v. Hardy*, 271 A.C.A. 378, 387.)

In the instant case, the prosecutor's comment was to the effect that no evidence had been presented regarding the defendant Longo's management qualifications. We deem this to have been a comment on the defendant's failure to introduce material evidence and not on his failure to testify. (See *People v. Hardy, supra.*) There were other ways than testifying whereby defendant could have presented evidence of his managerial qualifications, *e.g.*, through the testimony of co-defendant Benone Terrano. Accordingly, we find no *Griffin* violation occurred in the instant case.

DENIAL OF MOTION FOR MISTRIAL

Defendants argue that the jury failed to reach a unanimous verdict and that defendants' motion for a mistrial on this ground should have been granted.

After the clerk read the verdict in open court, the jury was first polled respecting Robert Migliaccio and the verdict of guilty rendered against him as to count I. Then the following colloquy occurred:

> "THE COURT: Mrs. Stolaski, is this your verdict?
> "JUROR STOLASKI: I have to hesitate. I was undecided.
> "THE COURT: Mrs. Stolaski, is this your verdict

or is it not your verdict?

"JUROR STOLASKI: We are told that we may be ––

"THE COURT: No wait a minute. Wait a minute. I want a yes or no answer. Is this your verdict or is it not your verdict?

"JUROR STOLASKI: Yes."

Defendants argue the doubt expressed by this juror not only cast doubt on the jury verdict against Migliaccio, but also impugned their subsequent verdict against the defendant Longo.

Our Constitution guarantees every criminal defendant his fundamental right to a unanimous jury verdict. (Cal.Const., art. 1, sec. 7.) Where a juror makes equivocal or conflicting statements as to whether he has assented to the verdict, a direct question of fact within the determination of the trial judge is presented. (*People v. Superior Court*, 67 Cal.2d 929, 932.) "The trial judge has the opportunity to observe the subtle factors of demeanor and tone of voice which mark the distinction between acquiescence and evasion of individual choice." (*Id.*)

The colloquy present in the instant case is strikingly similar to that which occurred in *People v. Burnett*, 204 Cal. App.2d 453, 457 (cited with approval in *People v. Superior Court, supra*, at 933.) In *Burnett*, the court upheld the trial judge's determination that the verdict was unanimous.

Whether we as trial judges would have sent the jury back for further deliberation under Penal Code, section 1164, is immaterial. We are bound by the trial court's determination that Juror Stolaski was sincere when she finally stated that this was her verdict. We find this argument of defendants without

merit.

SIMILAR OFFENSE

Defendants next argue that the court erred in permitting introduction of evidence of a similar transaction to the offense charged. The evidence of a similar transaction, they state to be the dealings between Taco Pronto and Associated.[4]

Defendants primarily rely on *People v. Haston*, 69 Cal.2d 233, 247, and argue that the distinctive "common marks" required by that case before a court can admit evidence of a similar offense to the one charged to show identity, are not present as between the offenses charged to have been committed against Rockview and the uncharged offense against Taco Pronto. The Attorney General attempts to show that the necessary "common marks" are present.

Both parties misconceive the *ratio decidendi* of *Haston*. *People v. Haston* has no application to the instant case. Associated's dealings with Taco Pronto were alleged to be the object of the conspiracy charged in count I of the indictment. Therefore, we need not consider their similarity to the offense charged as these dealings were a part of the offense charged. They were also part of the offenses charged in counts III and IV. If Associated's investments in Taco Pronto were on behalf of Rockview and all profits accrued to Rockview, it is possible that a necessary element of the charge of grand theft contained

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4 Defendants, in their brief, enumerate the evidence to which they take exception as follows: All conversations between Mr. Hettick, president of Taco Pronto, and defendants as it related to their particular transaction; agreements entered into between Associated and Taco Pronto including documents such as trust documents, authority to bank, assignment of stock and financial statements; evidence that Associated took over management of Taco Pronto and the Company bank account was closed and a new bank account opened; that bills of Taco Pronto were paid by Rockview with all but a couple of the checks returned to maker; and evidence of the financial condition of Taco Pronto after defendants were removed from management.

in counts III and IV would be missing. Accordingly, we find that the evidence defendants complain was erroneously admitted, was quite relevant and related directly to three of the offenses charged. Therefore this argument is without merit.

CONSPIRACY (COUNT II)

Defendant Longo argues that the failure to convict any coconspirators of the conspiracy alleged in count II renders his conviction erroneous. As previously indicat ed, a mistrial was declared as to the Terranos on this count and charges against them were subsequently dismissed on this count.

It is clear that for a conspiracy to exist, the indictment must allege the existence of a second party to the conspiracy. (*People v. Richards,* 67 Cal. 412.) However, nothing requires that this second party be prosecuted for the crime. (*People v. Calhoun,* 50 Cal.2d 137, 143; *People v. Gilbert,* 26 Cal.App. 2d 1, 26; Comment, 26 So.Calif.L.Rev. 64, 70.) If the second party is prosecuted for the crime and acquitted, the prosecution has failed to prove a conspiracy against the party convicted and his conviction must be reversed. (*People v. Prince,* 268 A.C.A. 435, 453; *People v. MacMullen,* 134 Cal.App. 81, 83-85; *Rex v. Plummer,* 2 King's Bench 339; 4 British Ruling Cases 917.) However, dismissal of charges against a party in order that he become a witness for the People does not amount to an acquittal (*People v. Gilbert, supra,* 26 Cal.App. 2d 1) and dismissal of charges under Penal Code, section 995 does not amount to an acquittal. (*People v. Reeves,* 250 Cal. App.2d 490, 493.) The question clearly posed in the instant case is, where a mistrial is declared because the jury is unable to agree on a verdict and charges are subsequently dismissed, this amounts to being " 'discharged under circumstances that amount to an acquittal.' (97 A.L.R. 1312, 1316.)" (*People v.*

James, 189 Cal.App.2d 14, 16.)

This question appears to be a matter of first impression in California. In most other states that have considered the question, a dismissal other than on the merits of conspiracy charges against all but one of the parties alleged to have participated will not ordinarily preclude the conviction of the remaining defendant. (See A.L.R.2d 705, 712.) There is a split among the federal circuits considering this question. (*Cf. United States v. Shipp* (6th Circuit), 359 Fed.2d 185, 189; *United States v. Fox* (3rd Circuit), 130 Fed.2d 56, 58; *Miller v. United States* (4th Circuit), 277 Fed. 721, 726; *Feder v. United States* (2nd Circuit), 257 Fed. 694, 696.)

In *People v. Gilbert, supra,* 26 Cal.App.2d 1, 26, the court stated, "[w]here, . . . the discharge of an alleged co-conspirator is not inconsistent with his guilt, but simply bars a subsequent prosecution of him, it does not invalidate the conviction of his coconspirators." The court in *Gilbert* was not considering a dismissal under the circumstances present in the instant case; however, the reasoning of the court is applicable. It was not until after a jury was impaneled for retrial of the Terranos that the district attorney moved to dismiss count II of the conspiracy against Ben and Victor Terrano. Ben Terrano entered a plea of guilty as to count I of the indictment. The discharge of defendants under these circumstances is not inconsistent with their guilt. The district attorney's motion to dismiss may well have been predicated on the fact that Ben Terrano pled guilty as to count I of the conspiracy. Accordingly, we find this argument of defendant is without merit.

ONLY ONE CONSPIRACY

Defendant Longo next argues that counts I and II of the

conspiracy should have been pled as one count. It is argued that there was but one conspiracy with several criminal objects.

The U. S. Supreme Court was called upon to pass on this very question in *Braverman v. United States,* 317 U.S. 49 [63 S.Ct. 99]. At page 53, Chief Justice Stone stated, "when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." (See *People v. Cossey,* 97 Cal.App.2d 101, 111.)

There was substantial evidence in the instant case of two conspiracies resulting from two separate agreements. In each conspiracy, there were different conspirators and different objects of the conspiracies.

Moreover, the bank accounts used in the second conspiracy were not opened until some time after Associated took over control of Rockview, indicating that a subsequent agreement was probably involved. We are satisfied that defendant Longo was properly charged, convicted and sentenced to two counts of conspiracy. (*Cf. People v. Otash,* 186 Cal.App.2d 132, 144-145; *People v. Carter,* 192 Cal.App.2d 648, 663.)

INSUFFICIENCY OF EVIDENCE (COUNT II)

Defendant Longo contends that there was insufficient evidence to tie him into the check kite forming the basis of

count II of the indictment.

The evidence shows that the checking accounts of Rockview and Associated were manipulated to create the artificial balance known as a "kite." Defendant Longo was a guiding force in the operation of both Associated Investors and Rockview Milk Farms. The mere fact that Longo did not personally open these checking accounts is not inconsistent with the jury's finding that he had conspired to violate Penal Code, section 476(a), in that checks were written on these accounts with insufficient funds on hand to cover them and with no prior credit arrangements to cover the overdrafts. (See *People v. Jones*, 136 Cal.App. 722, 727, holding that acts done by one member of a conspiracy in furtherance of the conspiracy, are chargeable to other members of the conspiracy.)

INSUFFICIENCY OF EVIDENCE (COUNT I)

Defendant Migliaccio argues that the evidence of the conspiracy alleged in count I against him was insufficient as a matter of law. Specifically, he claims that there is no evidence of defendant's involvement in negotiations, agreements or activities either with Lee Sievers, Donald Hettick of Taco Pronto, McCandless of Rockview or any of the banks.

It is a generally accepted principle of appellate review in criminal cases that where the evidence is in substantial conflict, the finding of the jury on issues of fact will not be disturbed. The judgment is presumed to be correct and the evidence will not be reweighed by the appellate court. (*People v. Newland*, 15 Cal.2d 678, 680-684.)

In the instant case the evidence revealed that during the period of the conspiracy alleged in count I, defendant Migliaccio was aware of the conspiracy and helped it along by his dealings with Mr. Davis of the Community Bank; in his

handling of the Rockview Milk Farms receipts; and in his obtaining of receipts after the sheriff had been placed as the receiver. Migliaccio was also signatory on one of the checks written to a Taco Pronto creditor.

It is not necessary that a party be a member of the original conspiracy. (*People v. Jones*, 25 Cal.App.2d 517, 520; *People v. Kizer*, 22 Cal.App. 10) and the conspiracy need not be the result of an "express" agreement (*People v. Calhoun*, 50 Cal.2d 137, 144), in order to prove a defendant guilty of conspiracy. Quoting from *Lefco v. United States*, 74 F.2d 66, 68-69, the court in *Anderson v. Superior Court*, 78 Cal. App.2d 22, 24, stated, " 'Common design is the essence of conspiracy. The crime may be committed whether or not the parties comprehend its entire scope, . . . [citations]. All conspirators need not be acquainted with one another, nor need they have originally conceived or participated in the conception of the conspiracy. Those who come on later and cooperate in the common effort to obtain the unlawful results become parties thereto and assume responsibility for all done before. [Citations.]' "

The evidence of defendant Migliaccio's involvement, although certainly not overwhelming, was sufficient to show his cooperation in the "common effort to obtain the unlawful results" of the conspiracy alleged in count I. We find the evidence sufficient to sustain his conviction on this count.

INSUFFICIENCY OF EVIDENCE (COUNT V)

Defendant Longo argues that the evidence he stole money due Mr. McCandless, was insufficient as a matter of law to warrant his conviction on count V.

Theft as defined in Penal Code, section 484 requires the appropriation of property of another. At best, Mr. McCandless'

testimony that any money was due him for the sale of milk to Rockview, was equivocal. Certainly, if no money was due McCandless, Longo could not be guilty of any theft from McCandless by his actions.

In embezzlement cases it has been held that the act of embezzlement is not complete until the checks taken are converted into cash. (*People v. Larson*, 92 Cal.App. 376, 381; see *People v. Cannon*, 77 Cal.App.2d 678, 691-692.) Embezzlement is now a part of the crime generally defined as "theft" by Penal Code, section 484. The evidence was uncontradicted that defendant Longo never cashed the check he allegedly diverted from Mr. McCandless.

We find that there is no substantial evidence in the record to support a jury finding of a necessary element of the crime of theft from Mr. McCandless, namely that any money was due Mr. McCandless that Longo could have appropriated. Moreover, the alleged appropriation was never completed by virtue that the check to Longo was never cashed. The defendant was not charged with attempted theft but rather theft. The judgment of conviction of defendant Longo on count V is reversed.

OPINION EVIDENCE

Defendant Longo contends that the court committed error in permitting opinion evidence as to the existence of a "check kite." It is argued that the experts could have adequately defined a check kite and described defendant's activity, leaving it to the jury to determine whether a check kite existed; that expert opinion was unnecessary on this issue.

We must confess at the outset,that defendant certainly ascribes a high degree of sophistication to the jury in the instant case. If there was ever a case where an expert should

be allowed to give an opinion on the ultimate issue to be decided, this is such a case.

"California has followed the modern tendency in rejecting the rule that expert opinion is inadmissible merely because it coincides with an ultimate issue of fact." (*Corn v. State Bar*, 68 Cal.2d 461, 466; *People v. Cole*, 47 Cal.2d 99, 105; *People v. Zismer*, 275 A.C.A. 720, 727, fn. 4; *People v. Martin*, 247 Cal.App.2d 416, 420-421; Evid. Code, section 805.) "[T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*People v. Cole, supra*, at p. 103.) In the instant case we conclude the latter to be true and hold the opinions of the experts were properly received into evidence.

The case, *People v. Arguello*, 244 Cal.App.2d 413, is easily distinguishable from the instant case. In *Arguello*, the court held that it was error to allow an expert to give an opinion that certain contraband was being held for sale.[5] A layman is clearly equipped to decide something like this, more than whether check kiting exists. (See *People v. Hardy*, 271 A.C.A. 378, 383-384.) In our case, the jury was instructed that they were not bound to accept the opinion of the experts.

It is noteworthy, that even if we were to conclude the

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5 *People v. Arguello* appears to be inconsistent with *People v. Martin*, 247 Cal.App.2d 416, 420, holding such an opinion is proper.

admission of this evidence to be error, defendant's trial counsel not only did not object to the evidence but affirmatively agreed to its introduction. The experts' opinions were properly received into evidence.

SENTENCING IMPROPER

Defendant Longo argues that the substantive offenses of theft alleged in counts III and IV were the objects of the conspiracy offenses alleged in counts I and II and, therefore, imposing sentence on all four counts was improper.

In the indictment, the thefts in counts III and IV are alleged as overt acts of the conspiracy charged in count I. Defendant Longo was sentenced on all three counts.

The law in this area is settled. "[A] defendant cannot be punished for both a substantive offense and a conspiracy to commit it *unless the conspiracy had an unlawful objective in addition to the commission of the substantive offense.*" [Emphasis added.] (*In re Romano*, 64 Cal.2d 826, 828; *People v. Mason*, 270 A.C.A. 807, 810.) In *Mason* the court set aside sentence on the conspiracy count when the conspiracy was for the object of a single objective, only the furnishing of drugs charged in two separate counts.

In the instant case count I charges other acts to be the object of the conspiracy than just those alleged in counts III and IV. In addition to the two checks written to Taco Pronto creditors, alleged in counts III and IV, proof was presented at trial of other checks written on Rockview accounts to Taco Pronto creditors. From this the trial court was correct in concluding the conspiracy in count I encompassed more than the acts alleged in counts III and IV and thus imposing sentence on counts III and IV as well as count I.[6]

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6 The sentences on these three counts was concurrent; however, this is immaterial if defendant should not have been sentenced on all three counts. (*People v. Quinn*, 61 Cal.2d 551, 555.)

We conclude that for the court to sentence Longo on counts I, III and IV was proper.

Defendant's last argument is that the indictment returned by the grand jury was improper in that the transcript was not a full transcript of the proceedings before the grand jury and unauthorized persons were permitted to be present during the session of the grand jury.

Defendants argue that because the transcript in two placed indicated "(Discussion held.)" off the record, that this indicates a violation of Penal Code, section 989.6, in that evidence was received other than by "witnesses produced and sworn before the grand jury." The mere fact that a discussion was had off the record does not indicate that any evidence was received. No cases have been cited by defendants nor could we discover any stating that a grand jury is precluded from having a discussion off the record.

Defendants also argue that since in each case a witness under examination was present during the off-the-record discussion, that this violated Penal Code, section 939, in that an unauthorized person was present "during the expression of the opinions of the grand jurors." We have no way of reviewing this question, in that we do not know what the discussion was about nor do we know if the witnesses in question could even hear the discussion. From the transcript it appears that the discussion was between the jurors and the assistant district attorney and that they may have suggested some areas they wished to have him clarify in his questions to the witnesses. We can find no impropriety in the record and defendants have not suggested how they were in any way prejudiced by these discussions. We find defendants' last argument without merit.

The judgment of conviction of Samuel Longo is reversed on count V and affirmed on all others. The judgment of conviction of Robert Migliaccio is affirmed.

MITCHELL,
J. Pro Tem*

We concur:

KERRIGAN,
Acting P.J.

TAMURA,
J.

Certified for nonpublication, Rule 976:

KERRIGAN,
Acting P.J.

TAMURA,
J.

MITCHELL,
J. Pro Tem*

*Assigned by the Chairman of the Judicial Council

APPENDIX "B"

(Post Card Notification)

CLERK'S OFFICE SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

FEB 13 1970

Dear Sir: I have this day filed Order.....

HEARING DENIED

In re: 4 CRIM. No. 3392

PEOPLE

vs.

LONGO, et al.

Respectfully,
WILLIAM I. SULLIVAN
Clerk

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 315 Third Street, Huntington Beach, California 92646, that on MAY 11th, 1970, I served the within PETITION FOR WRIT OF CERTIORARI (Oct. Term 1969, No. ..... – People v. Longo) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California addressed to said parties at the addresses as follows:

COUNTY CLERK, COUNTY OF ORANGE
ORANGE COUNTY COURTHOUSE
SANTA ANA, CALIFORNIA
FOR: HONORABLE KARL LYNN DAVIS, JUDGE [1 copy]

CLERK, FOURTH APPELLATE DISTRICT
STATE BUILDING
SAN DIEGO, CALIFORNIA 92101 [1 copy]

DISTRICT ATTORNEY, COUNTY OF ORANGE
212 HALL OF RECORDS
SANTA ANA, CALIFORNIA 92701 [1 copy]

ATTORNEY GENERAL, STATE OF CALIFORNIA
600 STATE BUILDING
LOS ANGELES, CALIFORNIA 90012 [2 copies]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MAY 11th, 1970, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer Co., 315 3rd St., Huntington Beach, Calif.
(714) 536-7161